(25,171)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 405.

EDUARDO RICAUD, L. C. BARLOW, AND CHARLES HICKERSON

vs.

THE AMERICAN METAL COMPANY, LIMITED.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 8, 1917.

1 United States Circuit Court of Appeals, Fifth Circuit.

No. 2750.

EDUARDO RICAUD, L. C. BARLOW, and CHARLES HICKERSON, Appellants,

vs.

THE AMERICAN METAL COMPANY, LIMITED, et al., Appellees.

Appeal from the District Court of the United States for the Western District of Texas.

Before Pardee and Walker, Circuit Judges, and Speer, District Judge.

Statement of the Case.

This is an action in equity brought by the American Metal Company, Limited, a corporation organized under the laws of the State of New York, to recover possession of certain bars of lead bullion.

Complainant below alleged that it was the owner of said bullion in September, 1913, and on the 13th of said month same was forcibly taken from its possession by persons to it unknown, without its consent; that said bullion was entered at the port of El Paso, Texas, March 25th, 1914, consigned to defendant L. C. Barlow and placed in the bonded warehouse in the care and custody of the Collector of Customs.

It applied for, and obtained a temporary injunction,
2 restraining the Collector of Customs from delivering the bullion to the other defendants, and all defendants were restrained from removing said bullion from the said bonded warehouse during the pendency of this suit.

Complainant alleged that said bullion originally consisted of 1500 bars, known as Lots Nos. 264, 265 and 266, and when entry was made it was 1279 bars, aggregating 167,801 pounds; and the reasonable market value at the time of filing suit (April 15th, 1914) was $17,887.44.

Complainant asked for recovery of said bullion, or in the alternative, its reasonable market value at the time of filing suit taken together with six per cent interest from April 15th, 1914, and for costs. It also asked for $741.35 damages, the claim for which was withdrawn on the trial in the court below.

The defendant Zach Cobb, Collector of Customs, answered that L. C. Barlow had made warehouse entries for 1279 bars of lead bullion, weighing 156,726 pounds and same was in his custody in the bonded warehouse, and that complainant's name did not appear in the records of his office in connection with said bullion.

Defendants L. C. Barlow and Eduardo Ricaud denied that complainant was the owner of said bullion or entitled to its possession, or that it was taken from it as alleged.

They further pleaded that L. C. Barlow is the owner of said bullion and that he purchased same from the defendant Ricaud who was the owner; that same was purchased by Ricaud from General Orestes Pereyra, Chief of the First Brigade of Durango, Constitutionalist Army of Mexico.

That in September, 1913, and for many months prior thereto a state of war existed in Mexico and a revolution was in
3 progress headed by Venustiano Carranza, who was named as Provisional President by the Constitutionalist forces then in revolution against the government headed by Victoriano Huerta; that the said Constitutionalist forces were in control of a large portion of the Republic of Mexico, including the cities of Mapimi, Bermejillo and Parral and that said General Pereyra was the military commander in control and in undisputed possession of said district in his official capacity as General in said army; that he was a duly commissioned General acting under a commission from said Carranza, First Chief and Provisional President of the Republic of Mexico;

That in September, 1913, the said Pereyra acting in his said capacity and under his commission as general aforesaid demanded and received from the Penoles Mining Company at Bermejillo 1500 bars of lead bullion;

That same was taken and received solely as a war measure for the purpose of providing his troops with clothing, munitions of war and food from the proceeds thereof, of which they were greatly in need;

That at the request of the representative of the said Penoles Company and to protect it in the value of said metal he gave a receipt for same showing that it consisted of 1500 bars of the value of 27,000 pesos, the same to be paid for on the triumph of the revolution or the establishment of a legal government;

That the said Pereyra caused the said bullion to be sold to defendant Ricaud and the money received for same was in fact used to purchase arms, ammunition, food and clothing for said Constitutionalist army; that the taking and receiving of the said bullion was a war measure caused and carried out because of the
4 necessities of war;

That at the time of taking it was the property of the Penoles Mining Company, claimed by them, was in their possession and receipt was given to the agent of said company.

That the taking and receipt of said bullion was made by the military officers of the *de facto* government, which since said date supplanted the government of Victoriano Huerta and is now the only government of the Republic of Mexico, and that said officers were duly commissioned and empowered to make levy of such material and munitions as they might require for war purposes, and that they made this levy in the legitimate exercise of their belligerent powers and duties.

Defendants also plead that the Penoles Mining Company was a Mexican corporation; that it did not deliver possession of said bullion to complainant, but that it was in the possession of said

Penoles Company at the time the same was received and claimed by said company as its property.

Defendants also plead that the allegations of complainant's bill are based upon disturbances of a political nature in a foreign government and that no act of the military commanders of the *de facto* government of Mexico *are* here subject to review;

That by reason of the above facts the Court had no jurisdiction in this cause and that if complainant had any ground of complaint it should be adjudicated either through the courts of Mexico or by international action between the two governments of the United States and Mexico, according to the principles of international law.

Defendants, therefore, ask that the bill be dismissed, that the Collector of Customs deliver the bullion to said Barlow and
5 for costs, etc.

The cause was tried by the Court and judgment rendered for complainants to which judgment defendants excepted in open Court and prayed an appeal to this Court, which was allowed.

On the hearing in the trial court there was evidence tending to establish the facts as claimed by each party.

Among the questions presented to this Court by the assignments of error are the following, to-wit:

I. Assuming that the bullion in suit was seized, condemned, and sold for war supplies by the Constitutionalist forces in revolution in Mexico, acting under authority from General Carranza, claiming to be the Provisional President of the Republic of Mexico, had the District Court of the Western District of Texas, into which the said bullion had been imported from Mexico, jurisdiction to try and adjudge as to the validity of the title acquired by and through the said seizure, appropriation, and sale by the Carranza forces as against an American citizen claiming ownership of the said bullion prior to its seizure?

II. If yes, does the subsequent recognition by the United States Government of Carranza as the legitimate President of the Republic of Mexico and his government as the only legitimate government of the Republic of Mexico deprive this Court of jurisdiction on this appeal to decide and adjudge the case on its merits?

III. If question 2 is answered in the negative, did the seizure, condemnation, and sale of the bullion in the manner and for the purposes stated to be assumed in question I have the effect of divesting the title to or ownership of it of a certain citizen of the United State of America not in or a resident of Mexico when such
6 seizure and condemnation occurred?

And the Judges desiring the instructions of the Honorable the Supreme Court for the proper decision of said questions do hereby certify the same to the Supreme Court.

For information as to the facts and questions in the case copies of transcript and briefs are herewith transmitted.

Witness our hands this 15th day of February, 1916.

(Signed) DON A. PARDEE,
Circuit Judge.
R. W. WALKER,
Circuit Judge.

Speer, District Judge, concurs.

7 UNITED STATES OF AMERICA,
Fifth Judicial Circuit, ss:

I, Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the foregoing certificate and statement of facts in the case of Eduardo Ricaud, L. C. Barlow and Charles Hickerson, Appellants, versus The American Metal Company, Limited, et al., appellees, was duly filed February 15th, 1916, and entered of record in my office by order of said court, and, as directed by said court, the said certificate is by me forwarded to the Supreme Court of the United States for its action thereon.

In Testimony Whereof, I have hereunto subscribed my name, and affixed the seal of said court, at the City of New Orleans, Louisiana, this 16th day of February, A. D. 1916.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

FRANK H. MORTIMER,
Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

[Endorsed:] No. 2750. United States Circuit Court of Appeals for the Fifth Circuit. Eduardo Ricaud, L. C. Barlow and Charles Hickerson, Appellants, vs. The American Metal Company, Limited, et al., Appellees. Certificate.

Endorsed on cover: File No. 25,171. U. S. Circuit Court Appeals, 5th Circuit. Term No. 405. Eduardo Ricaud, L. C. Barlow, and Charles Hickerson vs. The American Metal Company, Limited. (Certificate.) Filed March 10th, 1916. File No. 25,171.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1917.

No. 119.

EDUARDO RICAUD, L. C. BARLOW AND CHARLES HICKERSON, *Plaintiffs in Error.*

vs.

THE AMERICAN METAL COMPANY, LIMITED.

BRIEF OF APPELLANTS.

F. E. HUNTER,
R. B. REDIC,
Solicitors for Appellants.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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No. 119.

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THE AMERICAN METAL COMPANY, LIMITED.

BRIEF OF APPELLANTS.

STATEMENT OF THE CASE.

The statement of the case by the United States Circuit ourt of Appeals is here adopted.

This case being before the Court on Certified Questions opounded by the United States Circuit Court of Appeals, uch of the brief filed in that Court may be eliminated here, e questions of fact being stated.

The questions propounded cover the entire contention of appellants, and we submit the following propositions as decisive of this action:

1. The complainants' bill being based upon an act of the military commanders of the *de facto* government of that portion of Mexico where said bullion was, at the time it was seized, such government was foreign to the government of the United States, and is based upon disturbances of a political nature in such foreign government, over which the courts of the United States have no jurisdiction.

2. Parties belligerent in a public war are independent nations in effect.

3. Private property may be seized when needed in the course of military operations.

4. The acts of military commanders are covered by military law and military necessity, and such acts are not properly a subject of adjudication in the courts of another government.

5. The admission of the existence of insurrection or war by the political department of a government is a public act of which the courts must take notice.

6. It is a settled doctrine of our courts that for an act done in accordance with the usages of civilized warfare, no civil liability attaches to the officers or soldiers who acted under military authority.

7. Injuries suffered by a citizen of the United States in any foreign country at the hands of its *de facto* officers should be adjudicated by the two governments by international action according to the principles of international law, and are not properly a subject of adjudication by the courts of this country.

The Court will take judicial knowledge that Mexico is a foreign government, and that the political department of this government has recognized a state of war in Mexico.

The various acts of the United States government in regard to the revolution headed by Francisco Madero, the later acts of this government regarding the murder of Madero and the ascendency to power of Victoriano Huerta, the sending of the forces of the United States, both naval and military, to Vera Cruz, its occupation of that city, and the late proclamation of President Wilson to the leaders of the opposing factions, supplemented by the position taken by the United States published August 7th, 1915, is undisputed evidence that the political department of this government has recognized the existence of revolution and war in Mexico. And later, in October, 1915, recognized the Constitutionalist party as the *de facto* government of Mexico and Carranza as its Chief Executive, and still later has accredited him full diplomatic recognition as such President.

40 Cyc. 315.
The Three Friends, 166 U. S. 1.
The Itata 56 Fed. 505.
Jones vs. United States, 137 U. S. 202.
O'Neill vs. Central Leather Co., 94 Atlantic Rep. 789.

We contend that the court below had no jurisdiction in this case and should have dismissed the bill when it was shown by the undisputed evidence that the seizing of the bullion in controversy was made by the military commanders of the *de facto* government in Mexico by reason of the revolution then in progress.

Underhill vs. Hernandez, 65 Fed. Rep. 577 (38 L. R. A. 405, 407).
L'Invincible, 14 U. S. 238 (4 L. Ed. 80).
American Banana Co. vs. United Trust Co., 166 Fed. Rep. 261.

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Lamar vs. Browne, 92 U. S. 202 (25 L. Ed. 652).
O'Neill vs. Central Leather Co., 94 Atlantic Rep. 789.

By the law of nations, parties belligerent in a public war, are to all intents and purposes independent nations, and, as shown above, a revolution was in progress, the revolutionary forces were in charge of the particular place where this bullion was seized, and the seizure was made by revolutionary generals for military purposes in the conduct of the war; such acts are not here subject to review.

By the law of nations not only is public property of the enemy subject to seizure but, depending on the necessities of the case, private property as well may be seized either for the purposes of offense or defence, for the prevention of its falling into the hands of the enemy or for use in relieving the necessities of the particular force making the seizure, supplying it with arms, ammunition, food, clothing and general munitions of war. History is full of instances where military commanders have seized private property for military purposes and their acts have been upheld by the courts, not only of the United States but of all other civilized nations; but from the very nature of the seizure, the place where it was made, the conditions existing at the time and place are such as to show conclusively that such acts were without the jurisdiction of the courts of this country.

This Supreme Court has repeatedly held that the acts of military commanders are governed by military law and military necessity and such acts are not properly the subject of adjudication in the courts of another government.

If, therefore, the seizure was made by the military authorities and their act is not subject to adjudication here, then if the property was seized by them for military necessity and should later be brought within the jurisdiction of our courts, the question of ownership of such property, depending upon the acts of the military commanders, could not be the subject of a bill in equity as it thereby would require the Court to pass upon the acts of such military officer in discharge of his duty in a foreign government.

In the case of Ford vs. Surget, 97 U. S. 594 (24 Law Ed. 1018), where cotton was seized and destroyed, in the case of Lamar vs. Browne, 92 U. S. 202 (23 Law Ed. 652), where cotton was seized and disposed of, it was held that the military authorities had such power and if they had the power under the rules of civilized warfare then any disposition they made of the goods could not be the subject of adjudication in our courts.

The fact that the political department of the United States government has recognized the existence of war in Mexico on many occasions, and it being the settled doctrine of our courts that no civil liability attaches to the officers and soldiers when acting under military authority, places the bullion at issue in this case, in the position, that to hold that appellee (complainant below) could recover it, would be to hold that there was a personal liability on the part of General Pereyra, the officer who seized it, that he had no authority to make the seizure, and consequently no authority to dispose of it when seized, and to put it on the particular ground of legal decision, would be to hold that the courts of this country have a right to adjudicate such questions arising in a foreign jurisdiction.

If, instead of General Pereyra's authorizing the sale to Mr. Ricaud, one of the appellants, he had brought the bullion to this country himself, acting, as the undisputed evi-

dence shows he did act, solely in his military capacity, to procure munitions of war for his troops, it strikes us that he would have been acting clearly within his rights as a military commander, and such bullion, arriving in the jurisdiction of this Court under such circumstances, would not be subject to attachment or sequestration by complainants. If, therefore, the acts of the general could not be adjudicated here if he were a party defendant, we contend that the sale by him, after such seizure, places the person to whom he sold in the same position, because the possession of the bullion in either is the result of military seizure, and to hold that he could not sell would, in effect, be holding that he had no right to seize.

We would especially call the Court's attention to the decision in the case of Underhill vs. Hernandez from the United States Court of Appeals in the Second Circuit (reported in 65 Fed. Reporter 577) and the approval of same by the Supreme Court (168 U. S. 250) as a case directly in point. We beg to quote the words of Justice Wallace, the Circuit Judge, delivering the opinion of the Court:

> "Considerations of comity and of the highest expediency require that the conduct of states, whether in transactions with other states or with individuals, their own citizens or foreign citizens, should not be called in question by the legal tribunals of another jurisdiction. The citizens of a state have no adequate redress for any grievance at its hands by an appeal to the courts or the other departments of their own governments. It would not be only offensive and unnecessary but it would imperil the amicable relations between governments and vex the peace of nations to permit the sovereign acts or political transactions of states to be subjected to the examination of the legal tribunals of other states."

And the Supreme Court, acting through Chief Justice Fuller in affirming the decree of the Circuit Court, says:

> "We think the Circuit Court of Appeals was justified in concluding 'that the acts of the defendant were the acts of the government of Venezuela and as such are not properly the subject of adjudication in the court of another government.'"

We earnestly contend that the answer of this Court to question numbered I, should be that the District Court had no jurisdiction to try and adjudge as to the validity of the title acquired by and through the seizure, appropriation and sale by the Carranza forces.

If question numbered I is answered in the negative, we contend that this also disposes of questions II and III, for if the District Court had no jurisdiction to try and adjudge the title, then the Circuit Court of Appeals could not adjudge the case on the merits of the title, and effectually divested the title to or ownership of the bullion, even of an American citizen, as shown by the above authorities.

Respectfully submitted,

F. E. HUNTER,

R. B. REDIC,

Solicitors for Appellants.

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In the Supreme Court of the United States.

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EDUARDO RICAUD, L. C. BARLOW, AND CHARLES HICKERSON,
PLAINTIFFS IN ERROR,

vs.

THE AMERICAN METAL COMPANY, LIMITED.

On a Certificate from the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF OF AMICI CURIAE.

In the progress of the revolution in Mexico during the past four years, numerous seizures or confiscations of personal property in Mexico by one or the other of the parties engaged in the revolution have taken place. They are generally made as the result of a requisition or contribution, that is, a certain sum is levied sometimes only upon partisans of the opposing cause, sometimes, we believe, upon all residents alike, and upon failure of any person to pay his

share of the contribution, a portion of his property is seized and sold to pay such share.

Of the seizures so made in the northern states of Mexico, and especially in Chihuahua, Coahuila and Durango, perhaps the bulk of the property has found its way into the United States, the sales being generally made near the border. The original owners of the property so sold, in most cases Mexican citizens, have often followed the property into this country and have attempted to reclaim it in our courts. Consequently a considerable volume of litigation has resulted, one case having reached the Supreme Court of Errors and Appeals of New Jersey (O'Neill vs. Central Leather Co., 87 N. J. L., 552; 94 Atl., 789), and a number of other cases being still pending, not only in the border states, but, for example, in the Federal Courts of Colorado and Kansas. It is because of the importance of this present case as a precedent and because of their interest in some of the other cases pending that counsel who have signed this brief have asked leave to express their views upon the questions involved as *Amici Curiae.*

In the case at bar, as will be seen from the Certificate of the Court of Appeals, the military authorities of the army of Mexico, that is, of the Carranza or Constitutionalist forces, made a levy upon a Mexican mining company, the Penoles Mining Co., for the bullion in controversy. The bullion was sold and the purchaser shipped it into the United States at the port of entry, El Paso. While the bullion was still in the warehouse, the plaintiff, a corporation of the United States, claiming title to the bullion, started this action for an injunction restraining the

removal of the bullion. While the certificate does not show the nature of the plaintiff's claim to the bullion, the record in this case, which we understand is before this court, shows that the plaintiff claimed title under a bill of sale from the Mexican mining company, dated before the confiscation of the bullion by Mexican authorities.

It will thus be seen that the property was confiscated by the Constitutionalist military authorities as the property of a Mexican citizen and that there is at this time a question as to whom the property belonged at the time of the confiscation, that is, whether to the Mexican Company or to the American Company. It is apparently contended that if the property belonged to an American citizen at the time of its seizure by Mexican authorities that fact may give the court some additional reason for entertaining this action.

Without attempting to give a complete outline of the Mexican revolution, it is enough to say that in February, 1913, Victoriano Huerta revolted against the Madero government; that on February 20th, Venustiano Carranza, Governor of the State of Coahuila, under Madero, refused to recognize Huerta, and took the leadership of the counter-revolution; that on February 23rd, Francisco Madero was assassinated; that the government of the United States refused at all times to recognize Huerta, but on the contrary, on October 19th, 1915, recognized the Constitutionalist party as the *de facto* government of Mexico and Carranza as the Chief Executive of the *de facto* government; that later Carranza was elected President by the votes of the Mexican people, and that the government of the United States has ac-

corded him full diplomatic recognition as such President.

A resume of the position taken by the United States government prior to its recognition of the Carranza government is given in:

O'Neill vs. Central Leather Co., 87 N. J. L., 552; 94 Atl., 789-91.

This court will take judicial notice of such facts as are recited above.

Underhill vs. Hernandez, 168 U. S., 250, 253; 42 L. Ed., 456, 458.

Jones vs. United States, 137 U. S., 302; 34 L. Ed., 691.

Upon questions which are political and not judicial, the courts follow the determination of the legislative or the executive branch of the government.

Jones vs. United States, 137 U. S., 302; 34 L. Ed., 691.

Percy vs. Stranahan, 205 U. S., 257, 265, 273; 51 L. Ed., 793.

It is important to remember that the entire transaction embraced in the present case took place within the Republic of Mexico. The property was in that Republic at the time it was seized and it was there sold by the government, and was afterwards shipped by the purchaser to the United States.

It seems evident, therefore, that the questions in this case are governed by International law and not by Military law. In other words, there are a large

number of cases which were cited in the Circuit Court of Appeals which can have no application to this case, such, for instance, as the following:

Mitchell vs. Harmony, 13 How., 113; 14 L. Ed., 75.

Planters Bank vs. Union Bank, 21 L. Ed., 473; 16 Wall., 483; 83 U. S., 473.

U. S. vs. David G. Cooke, 17 L. Ed., 866; 2 Wall., 258; 69 U. S., 866.

together with cases from other Federal Courts and some Kentucky cases. Moreover, the Fifth Amendment to the Constitution of the United States is cited in argument.

The principles laid down in the above authorities and which are, of course, familiar to this court, are sustained by a long course of decisions in which this court has laid down certain rules as to the circumstances under which the troops of the United States are justified in seizing property, both of citizens of the United States and of enemies, and under what circumstances the officers who seize such property will be personally liable. Under the Constitution of the United States and under the policy declared by this court, that in this country military power is always subordinate to the Civil, and always subject to inquiry by the courts, a strict rule of liability and accountability has been laid down as governing our soldiers, both in times of war and times of peace.

It will, however, serve no useful purpose to examine these cases in order to determine under what circumstances this court has held that the United States troops may confiscate or take possession of

property, or in what cases the officers will be liable for exceeding their authority or in what cases the government will be compelled to make reparation for injuries done by the troops, since obviously these principles cannot govern in this case. These are principles laid down by this court for the government of the soldiers of this country.

If the Supreme Court of the Republic of Mexico were passing upon the act of the Commander who confiscated this bullion, it might follow the same rules of liability which have been laid down by this court or it might not. It might inquire, as this court would probably do in the case of an American Commander, into all the circumstances of the taking in order to decide whether the Commander was justified or not justified. On the other hand, it might decide that the declaration of martial law in Mexico and the suspension of all constitutional guarantees had made the military power the supreme power in the land for the time being and had relieved it from the necessity of accounting to the civil courts.

We are not sufficiently familiar with Mexican law to know what course would probably be adopted by the courts of that country.

The question before this court, however, is how far the courts of the United States can inquire into the transactions of the military authorities of the Republic of Mexico in regard to acts committed within the Republic of Mexico and in regard to property which it is claimed on the one side was at the time of seizure, the property of an American citizen, and on the other side, the property of a Mexican citizen. The principles which should govern the decision of this question have been often announced by

this court. Probably the two most striking cases are the following:

Underhill vs. Hernandez, 168 U. S., 250; 42 L. Ed., 456.

American Banana Company vs. United Fruit Co., 213 U. S., 347; 53 L. Ed., 826.

The first of these cases laid down the doctrine that the acts of a foreign government within its own territory could not be brought into judgment in the courts of this country and consequently the court refused to review the acts of Hernandez, leader of the revolutionary party in Venezuela, in compelling the plaintiff, an American citizen, to remain in the city of Bolivar to operate the waterworks and certain repair works for the benefit of the revolutionary party. It will be noticed that that case was strikingly similar to the case at bar in two respects at least:

1st. That the acts complained of were done by the head of the revolutionary party, which party was afterwards recognized by the government of the United States; and

2nd. That the person complaining was an American citizen.

In the case of the American Banana Co. vs. United Fruit Co., this doctrine was carried much farther following strictly the logic of the Underhill case. In the later case the American Banana Company pleaded a conspiracy on the part of the United Fruit Co. to drive the plaintiff out of business in Panama by the aid of the government of Costa Rica. It was argued for the plaintiff that the doctrine of

the Underhill case extended only to cases where the suit was directed against the foreign power itself or against an officer acting within its territory and under its commands. This court, however, rejected the limitation and refused to pass, even indirectly in a suit between two American citizens, upon the validity of acts done by the Costa Rican government.

The courts of England have also many times refused to entertain a suit, even between their own citizens, where the acts of a foreign government were called in question. Thus the right of a foreign government to grant inconsistent concessions to two British citizens or the right of a foreign government to grant a concession to a British citizen and then to withdraw it, or the legality of such withdrawal, cannot be inquired into by English courts. This has been held both where the action was entirely between British subjects and even in a case where the foreign power whose acts were attempted to be called in question, was actually a party to the suit, appearing of its own volition in the English courts.

National Bolivian Nav. Co. vs. Wilson, 5 App. Cases, 176, 196, 200; 43 L. T. Rep. N. S., 60.

Gladstone vs. Ottoman Bank, 1 Hemming & Miller, 505, 509-13; 9 Jur. N. S., 246; 32 N. J. Ch., 228; 8 L. T. Rep. N. S., 162; 1 New Rep., 512; 11 Wkly. Rep., 460.

Smith vs. Weguelin, L. R. 8 Eq., 198, 211-14; 38 L. J. Ch., 465; 20 L. T. Rep. N. S., 724; 17 Wkly. Rep., 904.

Wilson vs. Church, L. R. 13 Ch. Div. 1, 46-7, 54-5, 64.

We also call attention to the only case in the state courts of last resort that we have been able to find where this question has been considered:

O'Neill vs. Central Leather Co., 87 N. J. L., 552; 94 Atl., 789.

The same principle has been applied by this court in admiralty cases and particularly in Prize Cases. It will be remembered that Justice Holmes remarked in the American Banana case that for certain purposes the high seas are within the jurisdiction of all nations (213 U. S., 355-6). Nevertheless, in regard to the capture of vessels upon the high seas, this court has laid down the doctrine in a long series of cases that the "exclusive cognizance of Prize Questions belongs to the courts of the capturing power" and that "unless the neutral rights of the United States as ascertained by the laws of nations, the acts of Congress, and treaties with foreign powers, are violated by the cruisers sailing under commissions from those governments, captures by them are to be regarded by us as other captures, *jure belli*, are regarded; the legality of which cannot be determined in the courts of a neutral country."

The Divina Pastora, 4 Wheat., 52, 64; 4 L. Ed., 512, 515.

L'Invincible, 1 Wheat., 238, 254; 4 L. Ed., 80, 84.

The Estrella, 4 Wheat., 298, 307-9; 4 L. Ed., 574, 577.

The Nuestra Senora de la Caridad, 4 Wheat., 497; 4 L. Ed., 624.

The Alerta vs. Moran, 9 Cranch, 359, 364; 3 L. Ed., 758, 759.

The Santissima Trinidad, 7 Wheat., 283, 348-355; 5 L. Ed., 454, 470-2.

La Nereyda, 8 Wheat., 108, 168-9; 5 L. Ed., 574, 588.

L'Amistad de Rues, 5 Wheat., 385, 390-2; 5 L. Ed., 115.

Collins vs. Steamer Florida, 101 U. S., 37; 25 L. Ed., 898.

In the latest expression of this court in a case arising from the present war, the court reaffirmed the doctrine of the cases above cited, saying "the violation of neutrality is the basis of jurisdiction."

Berg vs. British & African Steam Nav. Co., U. S. Supreme Court Advance Opinions, 1916, No. 11, May 1st, 1917, p. 337 at page 343.

According to these same principles the fact that the captured vessel, or any captured property, is brought within the jurisdiction of the United States court cannot alone operate to give jurisdiction in this class of cases and this, in spite of the fact that Admiralty courts have a jurisdiction in rem perhaps more extensive than that of any other court.

Thus, as was said by Justice Johnson in one of the first cases, "under this view of the law of nations on this subject, it is evident that it becomes immaterial whether the *corpus* continue *sub potestate* of the capturing power or not."

L'Invincible, 1 Wheat., 238, 256; 4 L. Ed., 80, 85.

Therefore, the mere fact of the property being brought within the jurisdiction of the courts of this country does not give jurisdiction unless jurisdiction is conferred by a breach of our neutrality.

The Nuestra Senora de la Caridad, 4 Wheat., 497, 502; 4 L. Ed., 624, 625.

Collins vs. The Steamer Florida, 101 U. S., 37; 25 L. Ed., 898.

Berg vs. British and African Steam Nav. Co., U. S. Advance Opinions, 1916, No. 11, 337, 343.

As will be seen from all the cases upon this subject which we have cited, the basis of jurisdiction is the violation of neutrality. Of course, the presence of the property within American jurisdiction is necessary for a decree of restitution. In the absence of the property it is probable that the court might render a pecuniary judgment against the party in the case of violation of neutrality, as was said by Justice Story in the case of

L'Amistad de Rues, 5 Wheat., 385, 390,

but it is the violation of neutrality which gives jurisdiction and not the presence of the property within the jurisdiction of the court.

It cannot be contended in this case, where the acts were done wholly within the Republic of Mexico, that there was any violation of the neutrality of the United States so as to give this court any right to return the property to the person from whom it was taken by the Mexican government, whether that person be the Mexican corporation or the American cor-

poration. It has been held in these Prize Cases that the neutral court in the absence of violation of neutrality may inquire only whether the capturing vessel be, in fact, the commissioned cruiser of a belligerent power. This, of course, is to afford protection from piratical capture.

L'Invincible, 1 Wheat., 238, 258; 4 L. Ed., 80, 85.

The court cannot inquire whether the capture was made regularly or in accordance with the rules of war, these being questions which, as shown by the authorities cited above, are left to the courts of the captor. As Justice Story said, speaking of the rights of belligerents:

> "Each has an undoubted right to exercise all the rights of war against the other; and it cannot be a matter of judicial complaint, that they are exercised with severity, even if the parties do transcend those rules which the customary laws of war justify. At least, they have never been held within the cognizance of the prize tribunals of neutral nations. The captors are amenable to their own government exclusively, for any excess or irregularity in their proceedings; and a neutral nation ought not otherwise to interfere, than to prevent captors from obtaining any unjust advantage by a violation of its neutral jurisdiction."

Justice Story then points out that any other course would compel the courts of a neutral nation

to pass upon questions between belligerents without possessing adequate means of ascertaining the real facts or of compelling the attendance of foreign witnesses, and that such a course would "very soon embark neutral nations in all the controversies and hostilities of the conflicting parties."

L'Amistad de Rues, 5 Wheat., 385, 390-91; 5 L. Ed., 115, 116-17.

As Justice Johnson has pointed out in a case previously cited, the remedy of a neutral whose property has been unjustly taken from him by a foreign power is to apply for relief in the courts of that power and if he does not receive justice, to secure redress through his own nation, that is, through diplomatic channels.

L'Invincible, 1 Wheat., 238, 250-67; 4 L. Ed., 80, 85.

It is true that in the New Jersey case above cited, it is said that while the right to levy contributions and to seize property is undoubted, citing a number of cases by this court to that effect, yet this right must be exercised in accordance with the rules of war. What the court means by this, however, appears to be only that it must be exercised by order of responsible authority and must not be mere brigandage or looting. Moreover, it must be remembered that in that case the opinion was rendered before recognition of the Carranza government by the United States and the court was not discussing the acts of a recog-

nized government but simply the acts of belligerents who had not been recognized as a lawful government.

O'Neill vs. Central Leather Co., 87 N. J. L., 552; 94 Atl., 789, 791-2.

We have found no authority which would justify the courts of a neutral nation in deciding whether or not the armies of another nation were justified in taking property by the necessity of the army or for any other reason, as it is sought to have the court determine in this case. Indeed such a procedure will be in direct conflict with the cases in this court which we have cited. Our courts, as we have said before, are authorized to inquire into all these matters when they are dealing with the acts of their own soldiers but not when they are dealing with the acts of a foreign government, whether it be the military or civil arm of that government.

We contend, therefore, that the true rule of the decision of this case should be that when it was once established that the property was taken by authority of the Mexican government, the jurisdiction of the court ceased and no relief could be awarded the complainant even though it be a citizen of the United States. The complainant's remedy lies either in the courts of Mexico or through the diplomatic channels of the United States. If the property at the time of the taking belonged to a Mexican corporation, still less can any relief be granted it in these courts. The question then is one purely between the Mexican citizen and his own government.

It is true that in this case the lower court had, as we understand, proceeded to judgment before the

recognition of the Carranza government by the United States but such recognition is retroactive and all of the acts of such government from the commencement of its existence are validated as the acts of an independent nation.

Underhill vs. Hernandez, 168 U. S., 250, 253; 42 L. Ed., 456, 457.

As an appeal was taken from this judgment, however, pending which appeal the recognition of the Carranza government took place, we contend that it became the duty of the Circuit Court of Appeals, if satisfied from the evidence that the property was taken by authority of the Carranza government, to dismiss the case, or if the evidence on this question was not clear, to remand the case to the lower court with proper directions.

Respectfully submitted,

CHARLES D. HAYT,
CLYDE C. DAWSON,
FRED R. WRIGHT,
Amici Curiae.

[redacted]

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1917.

No. 119.

EDUARDO RICAUD, L. C. BARLOW and CHARLES HICKERSON,

Appellants,

vs.

THE AMERICAN METAL COMPANY, LIMITED, *et al.*,

Appellees.

BRIEF OF APPELLEE.

Statement of the Case.

The Circuit Court of Appeals for the Fifth Circuit has certified to this Court, pursuant to Section 239 of the Judicial Code, three questions of law arising upon an appeal to it from a judgment of the District Court in favor of the plaintiff, after a trial by the Court.

The questions are as follows:

> I. Assuming that the bullion in suit was seized, condemned and sold for war supplies by the Constitutionalist forces in revolution in Mexico, acting under authority from General Carranza, claiming to be the Provisional President of the Republic of Mexico, had the District Court of the Western District of Texas, into which the said bullion had been imported from Mexico, jurisdiction to try and adjudge as to the validity of the title acquired by and through the said seizure, appropriation and sale by the Carranza forces as against an American citizen claiming ownership of the said bullion prior to its seizure?
>
> II. If yes, does the subsequent recognition by the United States Government of Carranza as the legitimate president of the Republic of Mexico, and his government as the only legitimate government of the Republic of Mexico, deprive this Court of jurisdiction on this appeal to decide and adjudge the case on its merits?
>
> III. If question II is answered in the negative, did the seizure, condemnation and sale of the bullion in the manner and for the purposes stated to be assumed in question I, have the effect of divesting the title to or ownership of it of a certain citizen of the United States of America not in or a resident of Mexico when such seizure and condemnation occurred?

The certificate prefaces the questions with a summary of the allegations contained in the pleadings of the respective parties, adding that

> "On the hearing in the Trial Court there was evidence tending to establish the facts as claimed by each party."

The certificate, after stating the questions in the language above set forth, concludes with the further statement that

> "For information as to the facts and questions in the case copies of transcript and briefs are herewith presented."

We submit the following propositions for the consideration of the Court:

Preliminary Suggestions as to the Form of the Certificate.

The certificate is not sufficient to enable this Court to answer any of the three questions in that, as we shall hereafter show in detail, the certificate does not set forth sufficient facts. The defect is not cured by the reference to the transcript.

Stratton's Independence v. *Howbert,* 231 U. S., 399, 422.
United States v. *Union Pacific Railway,* 168 U. S., 505, 512.
McHenry v. *Alford,* 168 U. S., 651, 658, *et seq.*
Cincinnati etc. Railroad v. *McKeen,* 149 U. S., 259.

Argument.

In the last-named case, this Court, through Mr. Chief Justice Fuller, said:

> "After stating the questions, the certificate concluded with a direction to the clerk to submit to the Clerk of the Supreme Court of the United States, in connection with the

> certificate, twenty copies of the printed record in the cause, and it is apparent that reference to that record is necessary in order to the correct determination of the questions. * * * We are of opinion * * * that this certificate does not comply with Rule 37 of this court, inasmuch as it does not contain proper statement of the facts on which the questions or propositions of law arise. While we have the power to require the whole record and cause to be sent up to us for consideration and decision, the sixth section of the Judiciary Law of March 3, 1891, does not contemplate that questions or propositions of law shall be propounded and the entire record thereupon transmitted for us to answer such questions or propositions in view thereof. It is for us, when questions or propositions are certified, accompanied by a proper statement of the facts on which they arise, to determine whether we will answer them as propounded or direct the whole record to be placed before us in order to decide the matter in controversy in the same manner as if the case had been brought up by writ of error or appeal."

In the case at bar, the only facts presented to this Court by the certificate as a basis for its determination are the facts expressly assumed in each of the questions. That those facts are insufficient to enable the Court to answer the questions we shall show in detail hereafter. We merely wish to point out now that there are no other facts set forth in the certificate on which this Court could base its determination. The recitals of the certificate preceding the questions are merely a summary of the *pleadings* of the respective parties. True, the certificate then states that "there was evidence tending to establish the facts as claimed by each party." But it does not state which of the facts thus plead-

ed are actually to be deemed established or, if they are all to be deemed established, which of them are to be selected as a basis for the determination of this Court. The only guides furnished to this Court are the facts expressly assumed in each of the questions. Those statements, however, as we shall hereafter show, are quite insufficient for the purposes of this proceeding, and under the authorities above cited the defect is not cured by the general reference to the transcript.

Suggestions as to Question I.

1. The jurisdictional point involved in this question is that, generally speaking, our Courts will not adjudicate upon an act of a foreign government. The rule, however, is not entirely unqualified. The Courts will always inquire into the question whether the governmental agency which performed the act in question had general power to do the act and whether the situation was one that justified the exercise of that jurisdiction. Again, they will inquire whether the act was done in compliance with our views as to a fair and just procedure, and will deny the validity of the act where such is not the case. They will do this particularly in cases involving the title to property within their territorial jurisdiction, as is the case here.

Rose v. *Himely,* 4 Cranch., 241.
Sabariego v. *Maverick,* 124 U. S., 261.
The Santissima Trinidad, 7 Wheaton, 284.
O'Neill v. *Central Leather Co.,* 94 Atl. Rep., 789.

Authorities.

In *Rose* v. *Himely*, one question was whether our Courts could examine the jurisdiction of a foreign prize tribunal in order to determine whether a sentence pronounced by the same was the sentence of a court of competent jurisdiction.

Chief Justice Marshall unhesitatingly held that this right existed and that it extended not only to the question whether the foreign court had general power to do what it professed to do, but also to the further question whether the situation of the particular thing on which the sentence was passed was such as to subject it to the jurisdiction of the court in question.

In the *Sabariego* case (*supra*) this Court, in determining the plaintiff's title to lands in Texas, examined into the validity of a confiscation for treason of the lands by the military commander of the Spanish Government under whose deed the defendant claimed title. And it held that the deed of the military commander was not sufficient to convey title because there was no competent proof that the treason of the former owner had been established by proper proceedings.

In the *O'Neill* case the question was whether the seizure of certain hides by General Villa during the revolution in Mexico had divested the title of the owner. The Court, it is true, referred to the rule here invoked that "the Courts of one country will not sit in judgment on the acts of the government of another done within its own territory." But it did not finally apply that rule until it had elaborately examined into the status of General Villa and the forces he represented, the extent of the state of warfare and of the control exercised

by the Constitutionalists in the particular territory and the manner in which the seizure was carried out. It was only after he had reached the conclusion that all these prerequisites to the exercise of the right of seizure were present and that in the exercise of that right "the rules of war were complied with" by a fair and orderly levy of contributions properly distributing the burden among the taxpayers of the district (p. 792), that he declared the sale by General Villa valid and effective to convey title.

2. The certified question now under consideration does not present sufficient facts to enable this Court to determine whether the act of the Constitutionalist forces was such as to call for the application of the rule that our courts will not adjudicate upon the act of a foreign sovereign power or its agencies.

Argument.

The question calls for a determination as to the right of the District Court to inquire into an act alleged to have been done by an officer of a foreign government. As we have just seen, that right will be denied only if the act was of a certain quality, *i. e.*, where the official or body doing it was clothed with sufficient general authority and where the method of procedure employed was such as can be recognized as a just and fair method. We contend that the certificate does not state sufficient facts to enable this Court to determine whether the act here involved was of that quality.

The particular act referred to by the certified question is that of the "Constitutional forces in

revolution in Mexico" in seizing, condemning and selling "for war supplies" the bullion in suit. In order to determine the question whether that act was such an act of a foreign government or governmental officer as our courts would refuse to adjudicate upon, this Court must have before it facts which sufficiently describe the act. With regard to seizure in warfare by the forces of a foreign government, the rule of our courts is that such a seizure will not be questioned if it was had in accordance with the laws of civilized warfare.

As was said by Mr. Justice Swayze in *O'Neill* v. *Central Leather Company*, 94 Atlantic Rep., at 792:

> "The right to levy contributions is distinctly a conqueror's right and rests upon paramount force. * * * *Since the right exists under the laws of war, it must be exercised in accordance with those laws. It must not be confused with mere brigandage or looting.*"

Two methods of seizure are recognized by the rules of modern warfare. It may be had either as a result of the more orderly and fairer method of levying contributions (such as was adopted in the *O'Neill* case), or by summary confiscation. In order, however, to justify the adoption of the latter method,

> "The danger must be immediate and impending; or the necessity urgent for the public service, such as will not admit of delay and where the action of the civil authority would be too late in providing the means which the occasion calls for" (*Mitchel* v. *Harmony*, 13 How., 115, at 134).
>
> "It is not sufficient to show that he (the officer) exercised an honest judgment, and took the property to promote the public ser-

> vice; he must show by proof the nature and character of the emergency, such as he had reasonable grounds to believe it to be, and it is then for a jury to say, whether it was so pressing as not to admit of delay; and the occasion such, according to the information upon which he acted, that private rights must for the time give way to the common and public good" (*Ibid*, p. 135).

Such being the law, this Court must first be informed as to certain facts, if it is to determine whether or not the District Court properly entertained jurisdiction to pass upon the validity of the title to property attempted to be conveyed by the Constitutionalist forces. It should be informed as to the extent of the existence of warfare, whether in fact there was an actual state of warfare in the legal sense of that term. The certified question is silent upon this. It merely speaks of the Constitutionalist forces "in revolution." It should appear whether those forces were in sufficient control of the territory where the bullion was located to entitle them to be treated as the *de facto* government of that territory. Upon that point also the certified question is silent. It speaks of General Carranza merely as "*claiming* to be the Provisional President of the Republic of Mexico." Moreover, it does not state the method by which the seizure was effected, whether by a levy of contributions or by summary seizure. Nor does it state the conditions which prompted the seizure, so as to show whether or not there was a situation such as the officer might reasonably consider an urgent one demanding summary action on his part to supply the needs of his army.

As to all of these matters the certified question leaves this Court entirely in the dark. , The Court,

to answer the question, would have to resort to the transcript of the record and determine for itself the facts upon which it is to base its answer to the question, and that, as it has declared, it will not do in a proceeding of this nature.

2. The same result will follow even if the recital of the allegations in the pleadings as set forth in the certificate should be taken as a statement of established facts. For, while that recital contains the statement that the Constitutionalist General who made the seizure was in control and in undisputed possession of the City of Bermejillo where the bullion was seized, it does not, any more than the certified question, show the method pursued in making the seizure, or the conditions, if any, which warranted the same. All that this recital discloses upon this point is that the defendants allege that the bullion after being seized was sold and the *proceeds* used to purchase *other supplies* for the Constitutionalist army, of which that army was in need. This allegation, on the one hand, we submit, even if taken to be true, is not sufficient to enable this Court to find that the need was at all urgent so as to justify a summary seizure. On the other hand, taking it as an admission against the defendants, it shows on its face that there could not have been any urgent need, or any necessity at all, for the taking of the *bullion*. The bullion itself was not at all used by the army. If it needed anything, it was the *supplies purchased with the proceeds of the bullion*. The commander, however, instead of seizing the supplies which he is claimed to have needed, and which he would therefore have been justified in confiscating, deprived the plaintiff without compensation of its property, which he did not need, hence could not confiscate, and used the proceeds to pay the owner

of the supplies which he *did* need, hence should have confiscated it instead of the bullion. He thus, without any apparent justification whatever, took the property of one party, not to supply the needs of his army, but to compensate another party, whose property he might justly have taken but to whom he did not, for some reason unexplained, wish to cause any loss.

It will be observed that, judged by the allegations of the defendants' pleading, this case differs materially from *O'Neill* v. *Central Leather Company*. There, General Villa levied a general contribution on the entire district. The contribution was ratably apportioned among the taxpayers, and the hides in suit were taken from their owner, one of the taxpayers, because of his delinquency in paying his share of the contribution. Here, however, so far as the facts appear anywhere in the certificate, we are dealing with no such orderly proceeding, but solely with an isolated summary seizure of one man's property, not needed by the army, for the purpose of compensating another man whose property *is* needed for the use of the army. That such an act is entirely beyond the scope of a military commander's power is sufficiently indicated by such cases as *Mitchell* v. *Harmony*, 13 How., 115, 134; *Planter's Bank* v. *Union Bank*, 83 U. S., 483.

In the *Mitchell* case, as we have seen, the Court expressly stated that, to justify a seizure by a military commander,

> "the danger must be immediate and impending; or the necessity urgent for the public service, such as will admit of no delay, and where the action of the civil authority would be too late in providing the means which the occasion calls for."

And in the *Planter's Bank* case, where General Banks, in command at New Orleans, during our Civil War, commanded the New Orleans banks to pay to the quartermaster of the army all moneys in their possession belonging to enemies of the United States, the Court held that such an order was not authorized and that it was not justified by the necessities of war. Upon the latter point the Court said:

> "Then (on August 17, 1863) the City of New Orleans was in quiet possession of the United States forces. It had been captured more than fifteen months before that time, and undisturbed possession was maintained ever after its capture. Hence the order was no attempt to seize property *'flagrante bello'* nor was it a seizure for the immediate use of the army. It was simply an attempt to confiscate property which, though it may be subjected to confiscation by legislative authority, is, according to the modern law of nations, exempt from capture as booty of war."

If, therefore, the summary of the pleadings set forth in the certificate is for any reason to be relied upon by this Court as a statement of facts, it shows, *prima facie,* that the seizure was so clearly outside of the recognized rules of modern warfare, that our courts need not, even upon grounds of comity, hesitate to adjudicate the act void. They would not be bound to recognize such an act, any more than a judgment of a foreign court upon a matter clearly not within its jurisdiction. In that event, therefore, the first question will have to be answered in the affirmative, to the effect that the District Court had jurisdiction to deny the efficacy of an act, even of a military officer of a foreign government during a state of war, if that act could not by any possibility be deemed an act of legitimate warfare, dictated by what the officer might reasonably consider the necessities of war, but clearly was a mere wanton exercise of arbitrary power, apparently prompted by sheer favoritism.

Suggestions as to Question II.

The propositions stated under Question I are equally applicable here. The fact that the leader of the insurrectionary forces was subsequently recognized by our Government does not, in any sense, change the situation. We understand the law to be, that the acts of a *de facto* government, or its agents, even though not formally recognized by our Government, are on a level with the acts of a fully recognized *de jure* government. The question, therefore, is not whether or not the government was at any time recognized, but whether the act could at all be classed as a justifiable exercise of governmental power. If it was not such, then the subsequent recognition of the *de facto* or revolutionary government cannot clothe it with that character, and our courts are just as free, then, to criticize it as if that government had never been recognized. For, as appears from the *Sabariego* case, our courts will not hesitate to declare null and void an act of arbitrary confiscation, even by a regularly constituted government.

Here again, therefore, the facts set forth in the certified question taken by itself, are not sufficient to enable this Court to answer the question. Or, if the allegations of the pleadings, as set forth in the body of the certificate, are to be taken as statements of established facts, the District Court was dealing with an act of arbitrary confiscation, not

even remotely justified by the necessities of war, hence one which it could have rightfully declared invalid, even if the act had, in the first instance, been committed by an officer of a recognized government.

Suggestions as to Question III.

1. Here again the facts set forth in the certified question are insufficient to make it possible for the Court to answer the same, unless the allegations of the pleadings are to be taken as proved, in which event the question must be answered in favor of the plaintiff, *i. e.*, in the negative.

Argument.

If the facts set forth in the first two questions and in the certificate are not sufficient to determine the preliminary question upon which the jurisdiction of the District Court depended, viz., as to the general authority of the Constitutionalist officer to make seizures and as to the method employed by him in making the seizure in question, it follows *a fortiori* that the facts before this Court do not enable it to determine the third question, whether that act was sufficient to divest the plaintiff's title; for that requires a complete knowledge of the character of the officer's act. Was he in sufficient control of the territory in question and backed by a sufficient paramount force to constitute him the *de facto* governor of the district? If so, did he make the seizure in the course of a fair and orderly levy of contributions on all the taxpayers of the district, or did he arbitrarily and without any necessity seize property of the plaintiff only? Or if he took the property summarily, did he take it for any urgent necessity? None of these questions can possibly be answered by this Court, as they are all questions of fact. Nor are they matters as to which this Court can possibly take judicial cognizance. As to some of them, we do not even know whether any evidence was offered at the trial. Indeed, the summary of the pleadings contained in the certificate would indicate that some of them may not have been raised at all upon the trial. Recourse to the transcript is forbidden by the decision of this Court. How then are those questions to be decided? How can they even be argued upon the present record?

2. What has just been said is equally true even if all the allegations of the pleadings as they are set forth in the certificate should be treated here as established facts. Even then justification for the seizure would not appear, not even *prima facie*. On the contrary, as we have seen, it would appear from the defendants' allegations that the act was not, in any sense, justified by the law of warfare; that it was a confiscation, not of property for the needs of the army, but merely for the purpose of compensating, with its proceeds, other persons whose property *was* needed for the army and was properly subject to seizure, hence an arbitrary exercise of power. Such an act clearly cannot be given any effect in law, and the purchaser who took it from the officer in question acquired no more title than if he had bought stolen property.

3. The Hague Convention, to which both the United States and Mexico were signatories, expressly provides in Section III of the "Regulations

Respecting the Laws and Customs of War on Land" that "private property cannot be confiscated." And it limits the military authorities in control to the method of general requisition in raising necessaries for the army. In this aspect also, therefore, the act in question, as it appears from the certificate, must be considered an unlawful interference with private property which cannot give title to the defendants.

The Appellants' Authorities.

The authorities cited by the appellants are not in any sense in conflict with the arguments here presented either upon the question as to the necessary prerequisites to be established before the Court can determine whether the case is one in which it should refuse to adjudicate upon the act of the foreign officer, or upon the question whether *a title to property* is valid which is based on a seizure by an officer of a foreign power, regardless of the circumstances and manner in which the seizure was effected.

Underhill v. *Hernandez,* 65 Fed. Rep., 577, was a case where an officer of the Venezuelan insurgents was sought to be held *personally* liable in damages, not for a seizure of property, but for refusal to let the plaintiff depart from the City of Bolivar, which the defendant had just captured. All the details of the act were before the Court upon an appeal on the entire record. It appeared that the purpose of the restraint exercised over the plaintiff was to coerce him to operate his waterworks for the benefit of the community and of the revolutionary forces, and the Court held that the

act was not one the validity of which it would attempt to pass upon, quite evidently because it considered the acts complained of, and thus explained, as sufficiently within the general scope of the power of a military commander. There can be no comparison between such an act and the arbitrary seizure of the property of an individual not in itself necessary for the support or protection of the army, as would appear to have been the case here, if indeed we are at all informed as to the nature of the act.

The case of *L'Invincible,* 14 U. S., 238, cited by the appellants, really supports our contention that our courts will not renounce jurisdiction until they are satisfied that the prerequisites are present upon which alone the act of the foreign power can be justified. The Court there said (p. 258):

> "That the mere fact of seizure as prize does not of itself oust the neutral admiralty court of its jurisdiction, is evident from this fact, that there are acknowledged cases in which the courts of a neutral may interfere to divest possession; to wit, those in which her own right to stand neutral is invaded; and there is no case in which the court of a neutral may not claim the right of determining whether the capturing vessel be, in fact, the commissioned cruiser of a belligerent power. Without the exercise of jurisdiction thus far, in all cases, the power of the admiralty would be inadequate to afford protection from piratical capture."

Schooner Exchange v. *McFadden,* 11 U. S., 117, merely holds that a war vessel of a foreign nation at peace with this country is exempt from the jurisdiction of this country while in our ports. It thus has no bearing on this case.

Ford v. *Surget,* 97 U. S., 594, was a case where the plaintiff sought to hold in damages a person who, by order of the Confederate authorities, had destroyed cotton. Here, like in the *Hernandez* case, the ruling merely was that the defendant was not personally liable for his act. No question of the transfer of title to property was involved.

Dow v. *Johnson,* 100 U. S., 158, fully recognizes the rule invoked by us that before private property can be seized it must appear to be necessary for the support or convenient for the use of the army. It does not by any means announce the renunciation of all jurisdiction of our courts to inquire whether a given act was at all a legitimate exercise of war power. Moreover, it, again, is a case not involving questions of title, but merely the question of the officer's personal liability for an act apparently done in good faith.

Lamar v. *Browne,* 92 U. S., 187, was a case of the confiscation of cotton in our Civil War, not on any ground of the necessities of the army, but because in that war cotton was universally considered and treated as contraband and the subject of capture *under any and all circumstances.* The case cannot, therefore, bear upon the question whether a right of confiscation which is granted conditionally only was properly exercised.

American Banana Co. v. *United Fruit Co.,* 166 Fed. Rep., 261, while containing rather broad language which might be deemed to support some of appellants' contentions, again did not involve questions of title. It was an action for trade damages against the defendant for having instigated the Costa Rican Government to take possession of the

plaintiff's plantation. It does not, however, appear even to have been alleged or suggested that the acts of the Costa Rican Government were unlawful in any possible aspect. Naturally the defendant could not, in those circumstances, be held liable.

Conclusion.

If our contentions are sustained, this Court, it is respectfully submitted, should *either* dismiss the case for want of a proper statement of facts in the certificate, *or* answer the questions in favor of the plaintiff; that is to say—

I. Affirm the jurisdiction of the District Court to adjudicate upon the act of the Constitutionalist forces, palpably committed contrary to the laws of war;

II. Deny that such an act can be legalized by the subsequent recognition of the insurgent government;

III. Declare that the defendants cannot derive any title through the palpably unlawful act thus committed.

Respectfully submitted,

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JULIAN B. BEATY,
Of Counsel for Appellee,
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Office Supreme Court, U. S.
FILED
JAN 17 1918
JAMES D. MAHER,
Clerk.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1917

NO. 119.

EDUARDO RICAUD, L. C. BARLOW AND CHARLES HICKERSON, *Plaintiffs in Error*

vs.

THE AMERICAN METAL COMPANY, LIMITED.

BRIEF OF APPELLEE.

[redacted]Y,
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BRIEF OF APPELLEE.

STATEMENT OF THE CASE.

The statement of the case by the United States Circuit Court of Appeals is here adopted.

This case being before the court on certified questions propounded by the United States Circuit Court of Appeals, much of the matter included in the brief filed in the lower court may be eliminated, the facts being stated in the questions certified.

The questions propounded cover the facts in the case and we submit the following propositions and counter-propositions.

PROPOSITIONS.

First:

The complainant's (American Metal Company, Limited) bill being filed to determine the ownership and title to property of an American citizen, and said property together with the parties being within the actual jurisdiction of the court, the court would have jurisdiction and the right to adjudicate the title to said property.

Second:

The title to personal property can only be divested by due process of law, and where said property together with the parties are within the jurisdiction of the court, and the showing being made that said property belonged to complainant, appellant would be required to show that said title to said property had been legally divested by some law of the country where taken, and our courts are always open to its citizens for the recovery of their movable property, and the property being in the jurisdiction of the court, the court would have a right to inquire where it came from, to whom it belonged, and how and by what right it came to be in the possession of appellants.

Third:

Appellants having appeared, having plead to the merits and having plead as a defense that said property was taken as a war measure for the purpose of providing troops with clothing, munitions of war, etc., and that said bullion was sold to defendant Ricaud and the money used for the purchase of arms and supplies for the troops, and said bullion and said parties being before

the court and within the jurisdiction of the court, and there being evidence introduced tending to establish the facts as claimed by each party, and the court having heard all the evidence and all the facts, and having found against the defendants, judgment was properly rendered for appellee.

Fourth:

Appellee having alleged that it was the owner of the bullion sued for, that it was taken from it without its consent and without being paid for, and defendants having appeared and plead that said bullion was taken and seized as a war measure and having submitted themselves to the jurisdiction of the court and on the hearing there was evidence tending to establish the facts as claimed by each party, the court having all the parties and witnesses before it, and the evidence being conflicting, found against the defendants on their plea and awarded the bullion to appellee.

Sixth:

Defendants having plead that the bullion was taken as a war measure and the bullion and the parties being within the jurisdiction of the court, the court would have the right to inquire as to whether or not the bullion was taken in accordance with the rules of war, and whether or not the necessity, if any, authorizing its taking, existed; and the court having heard evidence on this issue and found against appellants, they would be bound.

STATEMENT.

The Circuit Court in their certified questions stated that the American Metal Company, Limited was the

owner of the bullion and that the same was forcibly taken from its possession and without its consent and prayed for the recovery of said bullion or for its value, and alleged that same was in the custody of the Collector of Customs at El Paso, Texas. Defendant Barlow plead that he was the owner of the bullion and purchased same from Ricaud, who purchased same for General Pereyra; that a state of war existed in Mexico and said bullion was taken by Pereya, as General, as a war measure, for the purpose of providing his troops with clothing, munitions of war, food, etc., that the taking and receipt of said bullion was made by the military officers of the defacto Government of which Venustiano Carranza was Provisional President. The Circuit Court finds and certifies that on the hearing in the trial court there was evidence tending to establish the facts as claimed by each party. The court having heard the evidence found against appellants on their plea.

AUTHORITIES.

Mitchel vs. Harmony, 15 Howard, 113;
14 Law Ed., U. S., 75.

PROPOSITION.

No person's property shall be taken, damaged or destroyed or applied to public use without ample compensation being paid therefor.

AUTHORITIES.

Fifth Am. Constitution of the U. S.
Mitchel vs. Harmony, 15 Howard, 113;
Sallards vs. Zones, 68 Ky., 90;
Ferguson vs. Lear, 68 Ky., 689;

Saratoga vs. 438 Bales of Cotton, Fed. Cases No. 12356;

PROPOSITION.

To authorize the seizure of private property when needed in the course of military operations, the necessity must be urgent and absolutely necessary, and unless the necessity is urgent, and it is not necessary in the course of actual military operations, a seizure so made would be void.

AUTHORITIES.

Mitchel vs. Harmony, 15 Howard, 113;
Planters Bank vs. Union Bank, 21 Law Ed., 473;
Also cases cited above.

PROPOSITION.

Where the evidence shows that a faction is in the undisputed control and possession of a certain territory and that war is not flagrant in said territory and no battles are being fought, the right and necessity to seize property for military purposes would not exist and a seizure so made would be void.

PROPOSITION.

Where war had been carried on and existed at a prior time in a certain territory and said territory had been conquered and was in the undisputed possession of the faction under which the seizure was made at the time, the necessity authorizing the seizure would not exist and the seizure so made would be void.

PROPOSITION.

Where a territory is under the control and in the un-

disputed possession of military authorities and no apparent necessity exists for seizing personal property, a seizure so made would be void.

STATEMENT.

The certificate states that a revolution was in progress in Mexico headed by Venustiano Carranza, and that the Constitutionalist forces were in control of a large portion of the Republic of Mexico, including the cities of Mapimi, Bermejillo and Parral, and that said General Pereyra was the military commander in control and in undisputed possession of said district in his official capacity as General in said army; that said bullion was taken from the Penoles Mining Company at Bermejillo and the facts certified fail to show that there was any war being waged in this territory or any battles being fought, or that war was flagrant at the time of seizure, and the right to seize said bullion would not exist.

AUTHORITIES.

Mitchel vs. Harmony, 15 Howard, 113;
Planters Bank vs. Union Bank, 21 Law Ed., 473;
U. S. vs. David G. Cook, 17 Law Ed. 866;
Ferguson vs. Lear, 68 Ky., 689;
Sallards vs. Zones, 68 Ky., 90;
Wheaton's International Law;
Hallock's International Law.

PROPOSITION.

Where a party does business in a territory which is under the control and in the undisputed possession of a certain faction, any seizure would be void.

STATEMENT.

The revolutionists being in undisputed posession of the territory of Bermejillo and surrounding territory, when and where this bullion was taken, the necessity authorizing its seizure would not exist.

AUTHORITIES.

Philippine Sugar Est. Dev. Co. vs. U. S., 40 Court of Claims, 833;

Also see authorities cited under above propositions.

ARGUMENT

The certificate of facts certified in this case shows that the property was purchased by the American Metal Company from Penoles Mining Company, a corporation doing business in Mexico, and which had been doing business a long time prior to the time the bullion was seized; that said bullion was taken without any legal process, authority or any adjudication under any rule, law or regulation existing in the foreign country in which it was done, and it was subsequently brought to the United States and entered at the port of El Paso, Texas and proceedings were promptly instituted by complainant for its recovery, defendants pleading and attempting to justify their possession on the ground that same was taken by the military forces during the progress of the revolution going on in Mexico at the time the property was taken; that the same was taken as a military necessity, the evidence showing that at the time the property was taken and at the place where it was taken every-

thing was peaceable, and the territory was in the undisputed control and possession of the faction by which same was taken. The certificate does not show that any battles were being fought or that war was flagrant. The certificate shows that evidence was introduced in the trial by the lower court by both parties supporting their respective claims, and that the court had all the parties and witnesses before it, and by awarding the bullion to complainant necessarily found against the defendants on their defense.

The court must bear in mind that this action, as originally instituted, was against the bullion and was not against any officer or agent of the Republic of Mexico or against any government. The complainant was not seeking redress affirmatively for a breach of military or civil acts of the Republic of Mexico in the courts of the United Statse and therefore the only question in the case is, "Do the defendants show title to the property in controversy?" And this the defendants have a right to do in any country and in any court, and the plaintiff has a right to resist it in any court of any country. The defendants alleging that at one time the bullion did belong to plaintiff and those under whom plaintiff claims, but that the title was divested out of it on account of being seized as a war measure, the burden rested on defendants to show that the necessity authorizing its taking as a war measure existed, in in fact it was so taken. And the defendants below had to show that it was taken under some law, rule or regulation existing in the territory where it was taken, and that it was taken as alleged by them. Our court would have a perfect right to inquire into these facts, and having inquired into the same.

and having heard the evidence and found against defendants, they would be bound.

Furthermore, admitting that war had been waged and was flagrant in a certain territory at a prior time to that of the seizure and the territory having come into, and under the undisputed possession and control of the party making the seizure; in other words, having resumed their normal status and conditions, the necessity authorizing the seizure would not exist, and the burden would be to show under the laws of Mexico such necessity.

In this case, the property for which the suit was filed is in the jurisdiction of the court, the case not being a personal action against any military officer, but we have the subject matter, that is the bullion, and the parties before us, and having shown that the American Metal Company Limited was the owner of the bullion, and that it was taken from them without their consent, the burden rested on the defendants to show by some known rule of law that this title was divested. And we respectfully submit that this Honorable Court should answer the questions by upholding the jurisdiction of our courts to inquire into these matters, and also find that the title of an American citizen to property could not be divested in the manner in which it is attempted to be done in this case.

Respectfully submitted,

[redacted],

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U. S. GOEN,

Attorneys for Appellee,
American Metal Company, Ltd.

RICAUD ET AL. *v.* AMERICAN METAL COMPANY, LIMITED.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 119. Submitted January 3, 1918.—Decided March 11, 1918.

The requirement that a certificate from the Circuit Court of Appeals shall contain a "proper statement of the facts on which the questions and propositions of law arise," (Rule 37) is not complied with by a statement of what is "alleged and denied" by the parties in their pleadings, supplemented by a statement that there was evidence tending to establish the facts as claimed by each party; nor should the questions be based upon an "assumed" statement of facts.

Facts supplied by judicial notice may enable the court to answer questions from the Court of Appeals, where otherwise the insufficiency of the certificate would necessitate its return to that court.

A bill in the District Court for the Western District of Texas, besides showing diverse citizenship, alleged that certain personal property of the plaintiff had been forcibly taken from its possession in Mexico by unknown persons, was consigned to one of the defendants at El Paso, and was in a bonded warehouse there in the possession of another defendant, as Collector of Customs, who, unless restrained as prayed, would deliver it to the other defendants. *Held*, that the case, as thus stated, was within the jurisdiction of the District Court, and that the facts, not mentioned in the bill, that the property had been seized, condemned and sold for war purposes by the Constitutionalist forces in revolution in Mexico, acting under authority of General Carranza, whose government was later recognized by the United States, did not deprive the courts of jurisdiction to adjudicate upon the validity of the title thus acquired, though in exercising the jurisdiction the action of the Mexican authorities must necessarily be accepted as a rule of decision. *Oetjen* v. *Central Leather Co.*, *ante*, 297.

The fact that property seized and sold by the authorities of a foreign government belonged to an American citizen, not residing in the foreign country at the time, does not empower a court of this country to reëxamine and modify their action.

THE case is stated in the opinion.

Mr. F. E. Hunter and *Mr. R. B. Redic* for Ricaud *et al.*

Mr. R. C. Walshe, *Mr. U. S. Goen*, *Mr. Julius Goldman* and *Mr. Julian B. Beaty* for American Metal Co., Ltd.

Mr. Charles D. Hayt, *Mr. Clyde C. Dawson* and *Mr. Fred R. Wright*, by leave of court, filed a brief as *amici curiæ*.

MR. JUSTICE CLARKE delivered the opinion of the court.

In this suit in equity, commenced in the United States District Court for the Western District of Texas, the plaintiff in that court claims to be the owner of and entitled to a large consignment of lead bullion held in bond by the

Collector of Customs at El Paso, Texas. An injunction was granted restraining the Collector until further order from delivering the bullion to either of the other defendants.

Barlow, one of the defendants in the District Court, claims to be the owner of the property by purchase from the defendant Ricaud, who it is claimed purchased it from General Pereyra, who in the year 1913 was the commander of a brigade of the Constitutionalist Army of Mexico of which Venustiano Carranza was then First Chief.

It is not seriously disputed that General Pereyra, in his capacity as a commanding officer, in September, 1913, demanded this bullion from the Penoles Mining Company, a Mexican corporation doing business at Bermejillo, Mexico; that when it was delivered to him he gave a receipt which contains a promise to pay for it "on the triumph of the revolution or the establishment of a legal government"; that Pereyra sold the bullion to defendant Ricaud, who sold it to the defendant Barlow; that the proceeds of the sale were devoted to the purchase of arms, ammunition, food and clothing for Pereyra's troops, and that Pereyra in the transaction represented and acted for the Government of General Carranza, which has since been recognized by the United States Government as the *de jure* Government of Mexico.

The plaintiff, appellee here, claims to have purchased the bullion from the Penoles Mining Company in June, 1913.

The District Court rendered a decree in favor of the plaintiff from which defendants appealed to the Circuit Court of Appeals for the Fifth Circuit, and that court certifies three questions as to which it desires the instruction of this court.

The sufficiency of the certificate of the Circuit Court of Appeals is challenged at the threshold.

There is no denying that there is much of merit in the objection to the form of this certificate, including the form of the questions, for the reason that the certificate, instead of containing a "proper statement of the facts on which the questions and propositions of law arise," as is required by Rule 37 of this court, contains a statement of what is "alleged and denied" by the parties plaintiff and defendant in their pleadings, with the additional statement that there was evidence "tending to establish the facts as claimed by each party," but without any finding whatever as to what the evidence showed the facts to be, and the first question, on which the other two depend, is in terms based entirely on an "assumed" statement of facts.

If this certificate had not been supplemented by the recognition by the United States Government of the Government of Carranza, first as the *de facto*, and later as the *de jure* Government of Mexico, of which facts this court will take judicial notice, (*Jones* v. *United States*, 137 U. S. 202; *Underhill* v. *Hernandez*, 168 U. S. 250) it would be our duty to declare the certificate insufficient and to return it to the Circuit Court of Appeals without answering the questions. *Cincinnati, Hamilton & Dayton R. R. Co.* v. *McKeen*, 149 U. S. 259; *Graver* v. *Faurot*, 162 U. S. 435; *Cross* v. *Evans*, 167 U. S. 60; *Stratton's Independence* v. *Howbert*, 231 U. S. 399, 422.

But this recognition of the government under which General Pereyra was acting, as the legitimate Government of Mexico, makes the answers to the questions so certain and its effect upon the case is so clear, that, for the purpose of making an end of the litigation, we will proceed to answer the questions.

The first question is:

"I. Assuming that the bullion in suit was seized, condemned, and sold for war supplies by the Constitutionalist forces in revolution in Mexico, acting under authority

from General Carranza, claiming to be the Provisional President of the Republic of Mexico, had the District Court of the Western District of Texas, into which the said bullion had been imported from Mexico, jurisdiction to try and adjudge as to the validity of the title acquired by and through the said seizure, appropriation, and sale by the Carranza forces as against an American citizen claiming ownership of the said bullion prior to its seizure?"

There can be no doubt that the required diversity of citizenship to give the District Court jurisdiction of the case was stated in the petition for injunction. The certificate shows that it was alleged in the petition that the bullion was the property of the plaintiff and that it had been forcibly taken from its possession in Mexico by unknown persons but without any reference being made to a state of war prevailing therein at the time; that it was consigned to defendant Barlow at El Paso, Texas, and was in a bonded warehouse in the possession of the defendant Cobb, as Collector of Customs, who, unless restrained by the court, would deliver it to the other defendants.

This form of petition brought the case within the jurisdiction of the District Court (*United States* v. *Arredondo*, 6 Pet. 691, 709; *Grignon's Lessee* v. *Astor*, 2 How. 319; *Minnesota Co.* v. *St. Paul Co.*, 2 Wall. 609, 632), and the question is, whether the circumstance that the bullion was seized, condemned and sold under the conditions stated in the question deprived the court of jurisdiction to go forward and adjudge as to the validity of the title acquired by the seizure and sale by the Carranza forces.

The answer which should be given to this question has been rendered not doubtful by the fact that, as we have said, the revolution inaugurated by General Carranza against General Huerta proved successful and the government established by him has been recognized by the

political department of our Government as the *de facto* and later as the *de jure* Government of Mexico, which decision binds the judges as well as all other officers and citizens of the Government. *United States* v. *Palmer*, 3 Wheat. 610; *In re Cooper*, 143 U. S. 472; *Jones* v. *United States*, 137 U. S. 202. This recognition is retroactive in effect and validates all the actions of the Carranza Government from the commencement of its existence (*Williams* v. *Bruffy*, 96 U. S. 176, 186; *Underhill* v. *Hernandez*, 168 U. S. 250, 253), and the action of General Pereyra complained of must therefore be regarded as the action, in time of civil war, of a duly commissioned general of the legitimate Government of Mexico.

It is settled that the courts will take judicial notice of such recognition, as we have here of the Carranza Government, by the political department of our Government (*Jones* v. *United States*, 137 U. S. 202), and that the courts of one independent government will not sit in judgment on the validity of the acts of another done within its own territory (*Underhill* v. *Hernandez*, 168 U. S. 250, 253; *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347; *Oetjen* v. *Central Leather Co.*, *ante*, 297). This last rule, however, does not deprive the courts of jurisdiction once acquired over a case. It requires only that, when it is made to appear that the foreign government has acted in a given way on the subject-matter of the litigation, the details of such action or the merit of the result cannot be questioned but must be accepted by our courts as a rule for their decision. To accept a ruling authority and to decide accordingly is not a surrender or abandonment of jurisdiction but is an exercise of it. It results that the title to the property in this case must be determined by the result of the action taken by the military authorities of Mexico and that giving effect to this rule is an exercise of jurisdiction which requires that the first question be answered in the affirmative.

The second question reads:

"II. If [the first question is answered in the affirmative,] does the subsequent recognition by the United States Government of Carranza as the legitimate President of the Republic of Mexico and his government as the only legitimate government of the Republic of Mexico deprive this court of jurisdiction on this appeal to decide and adjudge the case on its merits?"

Our answer to the first requires a negative answer to this second question.

The third question reads:

"III. If question two is answered in the negative, did the seizure, condemnation, and sale of the bullion in the manner and for the purposes stated to be assumed in question one have the effect of divesting the title to or ownership of it of a certain citizen of the United States of America not in or a resident of Mexico when such seizure and condemnation occurred?"

The answer to this question must be in the affirmative for the reasons given and upon the authorities cited in the opinion recently announced in cases Nos. 268 and 269, *Oetjen* v. *Central Leather Co.* The fact that the title to the property in controversy may have been in an American citizen, who was not in or a resident of Mexico at the time it was seized for military purposes by the legitimate Government of Mexico, does not affect the rule of law that the act within its own boundaries of one sovereign State cannot become the subject of reëxamination and modification in the courts of another. Such action, when shown to have been taken, becomes, as we have said, a rule of decision for the courts of this country. Whatever rights such an American citizen may have can be asserted only through the courts of Mexico or through the political departments of our Government. The first and third questions will be answered in the affirmative and the second in the negative.

And it is so ordered.